In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1213

STATE OF CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS, DIVISION OF INDUSTRIAL WELFARE; CALIFORNIA INDUSTRIAL WELFARE COMMISSION,
Petitioners,

vs.

HOMEMAKERS, INC., OF LOS ANGELES,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the Court of Appeals
for the Ninth Circuit

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Petitioners,

VS.

HOMEMAKERS, INC., OF LOS ANGELES,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the Court of Appeals
for the Ninth Circuit

The State of California, Department of Industrial Relations, Division of Industrial Welfare and the California Industrial Welfare Commission pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on December 31, 1974.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is appended to this petition as Appendix A. The opinion of the United States District Court for the Northern District of California is reported at 356 F.Supp. 1111 (N.D. Cal. 1973) and is appended to this petition as Appendix B.

JURISDICTION

Plaintiff-respondent Homemakers, Inc., of Los Angeles, sought declaratory and injunctive relief under 42 U.S.C. section 2000e, 28 U.S.C. sections 1331 and 1334 and 29 U.S.C. section 201. Jurisdiction was further invoked under Article III, clause 2, of the United States Constitution.

Following judgment by the District Court, an appeal was presented to the Court of Appeals for the Ninth Circuit. The Court of Appeals rendered judgment on December 31, 1974. No petition for rehearing was filed.

Petitioners invoke the jurisdiction of this Court under 28 U.S.C. section 1254(1) to review the decision of the Court of Appeals on issues of the utmost importance to millions of California employees.

QUESTIONS PRESENTED

1. Is a state statute expressly requiring a premium wage rate for work during overtime hours for female employees valid under Title VII of the Civil

Rights Act of 1964 when a complementary State Equal Pay Act requires that an employer nondiscriminatorily extend the premium wage rate to both its male and female employees?

2. Does the goal of eliminating sex discrimination mandated by Title VII and the Federal Equal Pay Act require this Court to interpret California Labor Code section 1350.5 and California Industrial Welfare Commission Order 5-68 as providing that the wage benefits hitherto granted to women be granted to men?

STATUTES INVOLVED

California Labor Code section 1350.5(a) provides:

> "(a) Employers of employees covered under the provisions of the Fair Labor Standards Act may employ females up to 10 hours during any one day of 24 hours or up to 58 hours in one week, provided that they are compensated at the rate of 1½ times the regular rate of pay for time worked for one employer in excess of eight hours in any one day or 40 hours in any one week."

The full text of section 1350.5 is appended to this petition as Appendix C.

California Labor Code section 1197.5 (Equal Pay Act) reads in pertinent part:

> "(a) No employer shall pay any individual in his employ at wage rates less than the rates paid to employees of the opposite sex in the same establishment for the same quantity and quality of the same classification of work; . . ."

The full text of section 1197.5 is appended to this petition as Appendix D.

California Labor Code section 1199 reads in pertinent part:

> "Every employer . . . is guilty of a misdemeanor . . . who does any of the following:
>
> * * *
>
> "(e) Reduces the wages of any employee in order to comply with Section 1197.5."

The pertinent portion of Title VII, 42 U.S.C. section 2000e-2, is appended to this petition as Appendix E.

STATEMENT OF THE CASE

Homemakers, Inc., filed in the United States District Court for the Northern District of California a complaint seeking declaratory and injunctive relief under Title VII of the Civil Rights Act of 1964. The action sought to prevent the enforcement of certain California statutes and administrative orders which require an employer to compensate employees at a premium wage rate for time worked in excess of the regular work day (eight hours) or regular work week (forty hours).

Homemakers is an employer of both males and females. Admittedly, Homemakers utilizes some of its employees for more than eight hours a day and for more than forty hours a week. Admittedly, Homemakers is not paying any of its employees the required premium pay for overtime hours. The complaint alleged that Homemakers is not required to comply with

the premium overtime wage rate statute because the statute speaks only to female employees and hence is discriminatory on the basis of sex and in conflict with Title VII of the Civil Rights Act of 1964.

Petitioners-defendants are the California State agencies charged by the Legislature with the administration and enforcement of the statutes and administrative orders presently in question. Pursuant to the State Equal Pay Act, petitioner Division of Industrial Welfare has repeatedly enforced the premium overtime wage rate statute in favor of both an employer's male and female employees. The Division has recovered on behalf of both men and women thousands of dollars of unpaid, premium overtime compensation. Petitioners have consistently argued in this litigation that these statutes and orders read in the context of federal and state anti-discrimination legislation require that the premium wage rate for overtime be granted to both an employer's male and female employees.

The Equal Employment Opportunity Commission filed a brief as amicus curiae in the District Court and the Court of Appeals, urging that the Commission's interpretation of Title VII in conjunction with the Federal Equal Pay Act, 29 U.S.C. 206 (d)(1), did not require invalidation of the California statutes and orders. Rather, the Commission urged that to eliminate sex discrimination, Title VII mandated that California Labor Code section 1350.5 be read to require California employers to pay both their male and female employees the premium wage rate for overtime hours.

On plaintiff's motion for summary judgment, the District Court held that the premium overtime wage rate provisions of California Labor Code section 1350.5 and Industrial Welfare Order 5-68, section 3, were in conflict with Title VII and thus null and void. The court refused to interpret the provisions of the California Equal Pay Act or Title VII as requiring extension of the overtime pay provision to male employees.

The Court of Appeals for the Ninth Circuit affirmed the lower court's decision. The Court of Appeals was persuaded that it was not within the province of the federal courts to determine how far, if at all, subsequent state legislation has shown an intent to redirect the original focus of the premium pay provisions, unless that intention is clearly shown. The Court of Appeals held that the statutes and orders in question conflict with Title VII and cannot be enforced against plaintiff.

Because of the substantial interests at stake, the Court of Appeals has stayed the issuance of its mandate until final resolution of the issues presented to this Court.

REASONS JUSTIFYING ISSUANCE OF THE WRIT

I.

THE NINTH CIRCUIT'S DECISION PRESENTS A DIRECT IRRECONCILABLE CONFLICT WITH THE EIGHTH CIRCUIT'S APPLICATION OF TITLE VII.

The Court of Appeals for the Eighth Circuit, in *Hays v. Potlatch Forests, Inc.* (8th Cir. 1972) 465 F.2d 1081, addressed the issue whether an Arkansas

statute which requires employers to pay female employees time-and-a-half for all hours worked in excess of eight hours per day was in conflict with Title VII of the Civil Rights Act of 1964. The Court of Appeals recognized that:

> "Insofar as the Arkansas statute results in discrimination against men . . . [the] conflict with Title VII can be avoided by requiring Potlatch to pay its male employees the same premium overtime rate which it is compelled to pay its female employees." [Footnotes omitted.]
>
> 465 F.2d at 1082.

The Court held that:

> "There is ample support for the position that any discrimination against men resulting from the Arkansas statute is to be cured by extending the benefits of that statute to male employees rather than holding it invalid. As the District Court pointed out, this position is in accord with the express policies of the Equal Pay Act, 29 U.S.C. §206(d)(1). See *Shultz v. American Can Company-Dixie Products,* 424 F.2d 356, 359 (8th Cir. 1970); *Murphy v. Miller Brewing Company,* 307 F.Supp. 829, 836-837 (E.D. Wis. 1969); 29 C.F.R. §§800.60 and 800.61; L. Kanowitz, Women and the Law, 121, 147 (1969) . . . ." [Footnotes omitted.]
>
> 465 F.2d at 1083.

The explicit holding of the Eighth Circuit is in direct, irreconcilable conflict with the instant decision of the Court of Appeals for the Ninth Circuit. The Ninth Circuit has held that California Labor Code section 1350.5, which is virtually identical to the

Arkansas overtime wage-rate statute, conflicts with Title VII and is therefore a nullity. This conflict between circuits centers on the judicial selection of remedies available under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e *et seq.* Furthermore, the conflict centers on the complementarity between Title VII and the Federal Equal Pay Act. The Ninth Circuit refused to acknowledge the positive remedial relationship between those two federal anti-discrimination acts. The Eighth Circuit, on the other hand, acknowledged and promoted the mutual purpose of each act to eliminate sex-based, wage discrimination and to assure economic security by maintaining rather than reducing the level of employee wage benefits.

The issues in conflict between these two circuits are of critical importance to the administration and enforcement of Title VII. The Eighth and Ninth Circuits have perceived totally different alternatives for fulfilling the statutory goal of eliminating discrimination based on sex. Rather than perceiving different alternatives in differing situations, in virtually identical legal and factual settings, the two circuits have fostered directly contradictory results under Title VII. One circuit assures the elimination of sex discrimination by denying the wage benefits to both sexes. The other circuit assures the elimination of sex discrimination by requiring the wage benefits be granted to both male and female employees.

Title VII of the Civil Rights Act of 1964 grants the judiciary extensive latitude to frame appropriate relief to overcome employment discrimination:

> "[t]he court may enjoin the respondent from engaging in such unlawful employment practice and order such affirmative action as may be appropriate . . . or any other equitable relief as the court deems appropriate."
>
> 42 U.S.C. §2000e-5(g).

In recent years, the federal judiciary has fashioned a cornucopia of affirmative remedies. Generally, these remedies have been structured to make the discriminatee whole and to remedy the effects of past discrimination. *Frontiero v. Richardson* (1973) 411 U.S. 677; *Franks v. Bowman Transportation Co.* (5th Cir. 1974) 495 F.2d 398. Federal courts have ordered affirmative recruitment programs to increase the number of minority employees. *Morrow v. Crisler* (5th Cir. 1974) 491 F.2d 1053. Hiring quotas for transition periods have been ordered to cure the present effects of past discrimination. *Vulcan Soc. of N.Y. Fire Department, Inc. v. Civil Service Comm. of the City of N.Y.* (2d Cir. 1973) 490 F.2d 387. Particularly illustrative of the use of affirmative relief is *Rosen v. Public Service Commission* (3rd Cir. 1973) 477 F.2d 90. The Third Circuit increased the pension rights of male employees to conform with those which had been provided to female employees. The Court expressly recognized that to eliminate purposefully sex discrimination, the employees of the disadvantaged sex should be brought up to the economic level of the employees of the opposite sex.

The instant conflict between the Eighth and Ninth Circuits hinges on this recognition of the affirmative

remedial purpose of Title VII. The Ninth Circuit's decision cannot be sustained without resolving the conflict. The Ninth Circuit simply abdicated the affirmative remedial function vested in the judiciary under Title VII.

In addition to the basic interpretative issue under Title VII, the Eighth and Ninth Circuits have given directly contradictory effect to the Federal Equal Pay Act, 29 U.S.C. §206. As the Eighth Circuit in *Hays v. Potlatch Forests, Inc., supra,* appreciated, the affirmative remedial dictates of Title VII are bolstered by the express policies of the Federal Equal Pay Act.[1] 465 F.2d at 1083. The Eighth Circuit found the remedial mandate of the Federal Equal Pay Act persuasive:

> ". . . an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee." 29 U.S.C. section 206(d)(1).

The Ninth Circuit ignored this directive of the Equal Pay Act in seeking an appropriate remedy under Title VII.

Furthermore, the Ninth Circuit ignored the California Equal Pay Act which requires the identical affirmative relief mandated under the Federal Equal Pay Act.[2] In *Hays v. Potlatch Forests, Inc., supra,*

[1]The Equal Pay Act has been consistently found significant in interpreting Title VII. See *Ammons v. Zia Company* (10th Cir. 1971) 448 F.2d 117; *Hodgson v. Brookhaven General Hospital* (5th Cir. 1970) 436 F.2d 719.

[2]California Labor Code section 1197.5 declares in pertinent part that "No employer shall pay any individual in his employ at wage rates less than the rates paid to employees of the opposite sex . . ."

the Eighth Circuit did not have the benefit of such explicit state remedial legislation. Nevertheless, the Eighth Circuit was compelled to grant affirmative relief under the federal anti-discrimination laws. The Ninth Circuit, in direct contrast, also eliminated discrimination but only by eliminating the statutorily granted premium wage benefit for all employees. To remedy discrimination, the Ninth Circuit directed the employer to disregard both the state and federal equal pay prohibitions that an employer may not reduce an employee's wage rate to achieve equality. The Ninth Circuit permitted the employer to do precisely what state and federal law prohibit.

The Ninth Circuit's remedy of debilitating equalization, if permitted to stand, will undermine the enforcement efforts of those presently suffering from sex-based, wage discrimination. The disadvantaged will perceive that little or nothing can be gained by an attempt to remedy wage discrimination. In vivid contrast, the Eighth Circuit's decision promotes the fundamental purposes of Title VII—the assurance of equal opportunity for employment advantages. Petitioners respectfully submit that it is incumbent upon this Court to resolve this irreconcilable conflict between circuits in favor of the affirmative remedial purposes of Title VII.

Labor Code section 1199 provides in pertinent part that any employer shall be guilty of a misdemeanor who "(e) Reduces the wages of any employee in order to comply with Section 1197.5."

II.

THE ISSUES PRESENTED ARE OF CRITICAL ECONOMIC SIGNIFICANCE TO VAST NUMBERS OF CALIFORNIA EMPLOYEES AND TO EMPLOYEES IN OTHER STATES.

The decision of the Court of Appeals denying the enforceability of California's premium overtime wage-rate statute deprives approximately two million California female employees from receiving overtime wage benefits. Concurrently, the decision deprives even greater numbers of male employees from the statutorily-guaranteed right to equal premium overtime wage rates. Since approximately forty percent of California employees are not covered by the Federal Fair Labor Standards Act but exclusively rely upon California's premium overtime wage-rate guarantee, the aggregate economic significance of the decision is tremendous. A monetary estimate of the decision's impact is beyond calculation. But moreover, the economic impact to the individual employee and the employee's family may be dramatic. Premium overtime wages provide one of the most significant income-raising avenues available to financially desperate employees. Kanowitz, *The Equal Rights Amendment and the Overtime Illusion*, 1 N.Mex. L.R. 461, 477 (1971). The decision of the Court of Appeals barricades that avenue for a substantial number of California employees.

When originally enacted, California Labor Code sections 1350 and 1350.5 provided female and minor employees with wage benefit and working hour protections. Subsequently, the California Legislature has sought to eliminate all sex-based wage discrimination.

Amendments to the State Equal Pay Act unequivocally call for the sexually non-discriminatory extension to employees of one sex those wage rate benefits presently granted to the opposite sex. *See* Labor Code sections 1197.5, 1199(e). The decision of the Court of Appeals ignores this demonstrative State legislative intent not only to eliminate sex-based, wage discrimination but to assure equality through affirmative relief.

The issues presented in this case transcend the recognition of premium overtime wage rates for California male employees. As discussed above in Part I, Congress has vested the federal judiciary with the responsibility for the enforcement of Title VII and granted to the judiciary wide discretion to exercise affirmatively their equitable powers to fashion complete relief. 42 U.S.C. §2000e-5(g). The congressional direction for affirmative relief envisions remedies which compensate for past discrimination and which promote present economic security. *Rosen v. Public Service Elec. and Gas Co.* (3rd Cir. 1973) 477 F.2d 90. The Ninth Circuit abandoned its affirmative remedial responsibility by invalidating section 1350.5 and withdrawing substantial wage benefits relied upon by California employees. A review of the Ninth Circuit's decision raises the crucial issue of the affirmative character of the judicial remedy available under Title VII.

An additional issue of national significance is the remedial relationship between the Federal Equal Pay Act and Title VII in the elimination of sex-based,

wage discrimination. The District Court and the Court of Appeals refused to find any interpretative significance in the Equal Pay Act in fashioning a remedy under Title VII. The decision of the Court of Appeals promotes a contradictory resolution of sex-based, wage discrimination between the Equal Pay Act and Title VII. Since both Acts attack sex-based, wage discrimination, an authoritative decision on their remedial complementarity is crucial.

The Court of Appeals refers to recently enacted California legislation as indicative of a legislative intent to "cure" the existing overtime wage rate provision. Assembly Bill 478, October 1, 1973, Stats. 1973, ch. 1007. This legislation, however, does not diminish the significance of this litigation. It does not resolve the instant controversy and it will not resolve future controversies over the validity of California's premium overtime wage rate statute. Assembly Bill 478 neither amends nor repeals Labor Code section 1350.5. The bill essentially grants authority to the Industrial Welfare Commission to establish the rules and regulations necessary to provide adequate and reasonable wages, hours and working conditions for both male and female employees. *See* Labor Code section 1173. Assembly Bill 478 continues the long-standing dual guarantee of both the Commission's orders and the statutory provision for overtime wage rate benefits. The retention of section 1350.5 voices the Legislature's concern for a statutory guarantee of a premium overtime wage rate. Rather than a reflection of the Legislature's dissatisfaction with section

1350.5, Assembly Bill 478 manifests the Legislature's renewed commitment to stand behind its statutory overtime wage rate provision.

California stands with numerous other states which have sought to remedy sex-based wage discrimination through the enactment of state equal pay acts. This litigation questions the efficacy of state legislation to remedy previously enacted sexually discriminatory, wage benefit guarantees. California, a pioneer in anti-discrimination legislation, has sought to eliminate discrimination while maintaining the same high level of wage benefits for all employees. The decision of the Ninth Circuit frustrates this perceptive, remedial intent of California's Equal Pay Act. With the decision of the Ninth Circuit, the potency of each state's equal pay act is now suspect. An issue of such nationwide significance calls for an authoritative review by this Court.

III.

THE NINTH CIRCUIT'S DISREGARD OF THE EEOC'S INTERPRETATION DISREGARDS THIS COURT'S DECISION AND THE WILL OF CONGRESS.

In *Griggs v. Duke Power Company* (1971) 401 U.S. 424, this Court considered the weight to be accorded the Equal Employment Opportunity Commission's guidelines interpreting Title VII. This Court acknowledged that, "The administrative interpretation of the Act by the enforcing agency is entitled to great deference." 401 U.S. at 434. Since the Commission's

construction complemented the Act and its legislative history, this Court acknowledged the guidelines as expressing the "will of Congress".

In the instant case, the District Court and the Court of Appeals refused to extend any degree of deference toward the relevant interpretation of the Commission.

The Commission has promulgated Guidelines on Discrimination Because of Sex. 29 C.F.R. §§1604.1-1604.10. The pertinent guideline, 29 C.F.R. §1604.2(b)(3), provides that an employer must give the same benefit of a premium wage rate for overtime to male employees that state law requires for female employees.

The Commission's guideline is remedial in character; it suggests that sex-based, wage discrimination should be resolved by raising the wage rate of the disadvantaged group. The remedy suggests no more than the implementation of Title VII in recognition of the remedial requirements of the Federal Equal Pay Act. Title VII prohibits discrimination based on sex with respect to an employee's wages. 42 U.S.C. §2000e-2. The Equal Pay Act declares that any wage rate differential shall be remedied by raising the wage rate of the disadvantaged employee. 29 U.S.C. §206(d)(1). In the field of sex-based, wage discrimination, Title VII and the Equal Pay Act are in *pari materia* and are to be construed so as to implement each other. *Shultz v. Wheaton Glass Co.* (3rd Cir. 1970) 421 F.2d 259, 266. Furthermore, Congress has mandated that the court in applying Title VII look to the Equal Pay Act to determine the existence of

sex based, wage discrimination. 42 U.S.C. §2000e-2. The Commission's guideline simply construes together the express directives of the Equal Pay Act and Title VII. The Ninth Circuit, by ignoring the Commission's guideline, ignored the Congressionally mandated, affirmative remedial relationship between the Equal Pay Act and Title VII.

The Court of Appeals attempted to justify its rejection of the guideline by reasoning that the Commission's authority does not include authority to issue "regulations" which would modify "state substantive law." However, the Commission's authority to promulgate "regulations" is not at issue. The issue is the interpretative significance to be attributed to the Commission's guidelines in effecting an appropriate remedy under Title VII. The Court refused to accord any weight to the Commission's experience in remedying sex-based, wage discrimination under Title VII. Moreover, since the guideline simply reiterates the requirements of the Equal Pay Act and Title VII, the Ninth Circuit has simply disregarded the interpretative significance of the Equal Pay Act.

If an employer were in violation of the Federal Equal Pay Act for sex-based, wage discrimination, the Act would require raising the wage rate of the disadvantaged sex to the wage rate of the favored sex. *See Hodgson v. Wheaton Glass Co.* (3rd Cir. 1971) 446 F.2d 527. Under the Act, equality of wages cannot be achieved by a lowering of a wage rate. If this same employer were charged with sex-based, wage discrimination under Title VII, the identical remedy

would obtain. *See Rosen v. Public Service Elec. and Gas Co.* (3rd Cir. 1973) 477 F.2d 90. In the instant case, the employer complains that a state statute produces sex-based, wage discrimination and that the remedy must be the elimination of wage benefits through the invalidation of the statute. The fact that a state statute is in question neither justifies nor requires the elimination of the premium wage rate to achieve the equality mandated under Title VII. If the employer had sought the invalidation of the statute under the Federal Equal Pay Act, the remedy, as required by the Act, would be to raise the wage rate of the disadvantaged sex. Wage-Hour Admin., Interpretative Bulletin 800.162. The general provisions of Title VII should not be manipulated to frustrate the clear congressional directive to provide affirmative relief for sex-based wage discrimination.

The Commission's guideline implements the remedies specified under the Equal Pay Act to sex-based, wage discrimination prosecuted under Title VII. The Ninth Circuit's refusal to consider the guideline constitutes, therefore, a refusal to consider the will of Congress. The Ninth Circuit's total disregard of congressional intent constitutes an abuse of the Federal Courts' vested responsibility for affirmative enforcement of Title VII.

In the Equal Employment Opportunity Act of 1972, Pub. L. 92-261, Congress amended Title VII to provide the Commission with further authority to investigate individual charges of discrimination and to promote voluntary compliance with the requirements

of Title VII. *Alexander v. Gardner-Denver Co.* (1974) 415 U.S. 36, 44. To accomplish these functions, the Commission's guidelines should not be subject to the spurious distinctions and restrictions suggested by the Ninth Circuit. A perceptive, authoritative decision by this Court is essential.

CONCLUSION

For the reasons discussed above, petitioners respectfully submit that a Writ of Certiorari should issue to review the decision of the lower court affecting significant State and Federal questions.

Dated: March 21, 1975.

Respectfully submitted,

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(Appendices Follow)

Appendix A

United States Court of Appeals
for the Ninth Circuit

No. 73-1786

Homemakers, Inc., of Los Angeles,
Plaintiff-Appellee,

vs.

Division of Industrial Welfare and Industrial Welfare Commission of the State of California,
Defendants-Appellants.

[December 31, 1974]

Appeal from the United States District Court
for the Northern District of California

OPINION

Before: LUMBARD,* KOELSCH and WRIGHT, Circuit Judges.

WRIGHT, Circuit Judge:

This is an appeal from an order declaring invalid certain provisions of the California Labor Code and related orders of the California Industrial Welfare Commission requiring payment of premium overtime pay to covered women employees. The district court

*Senior Circuit Judge, United States Court of Appeals for the Second Circuit.

found that the provisions in question were in conflict with and superseded by Title VII of the Civil Rights Act of 1964 [42 U.S.C. § 2000e *et seq.* (1970)].[1] It also found that plaintiff's failure to comply with the California statute did not give rise to an unlawful employment practice under Title VII.

Homemakers is an employer of domestic workers and persons who care for the sick in patients' homes. It initiated this action to restrain appellant state agencies from enforcing against it those women's premium overtime pay provisions in *Cal. Labor Code* §§ 1350 and 1350.5[2] which it claimed would require

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[1]The pertinent provision of Title VII is 42 U.S.C. § 2000e-2, which reads in relevant part:

"(a) It shall be unlawful employment practice for an employer—

"(1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

"(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * * * * * *

"(e) Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise. . . ."

[2]Cal. Labor Code § 1350. *Maximum hours per day and week*

"No female shall be employed in any [of the designated industries], more than eight hours during any one day of 24 hours or more than 48 hours in one week, except as provided in Section 1350.5."

§ 1350.5. *Employees covered under Fair Labor Standards Act; overtime; exceptions; airline female employees*

it to discriminate in favor of women in violation of Title VII.

In response, appellants reasoned that the challenged statutes and orders presented no inevitable conflict with federal law, since Homemakers could comply readily with both federal and state requirements by extending the benefits of the premium overtime pay legislation to its male as well as to its female employees. Indeed, they argued that state and federal "equal pay" laws, *see Cal. Labor Code* § 1197.5 (1970); 29 U.S.C. § 206(d) (1970), require employers to pay both sexes at the higher overtime pay rates provided for women. Appellants relied also on Equal Employment Opportunity Commission [EEOC] guidelines which make it a violation of Title VII for an employer to refuse to hire female employees in order to avoid payment of overtime, or for an employer to fail to

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"(a) Employers of employees covered under the provisions of the Fair Labor Standards Act may employ females up to 10 hours during any one day of 24 hours or up to 58 hours in one week, provided that they are compensated at the rate of 1½ times the regular rate of pay for time worked for one employer in excess of eight hours in any one day or 40 hours in any one week.

"(b) The provisions of subdivision (a) shall not apply to: (1) employers whose employees are exempted in Section 13 of the Fair Labor Standards Act as amended through February 1, 1967, from the provisions of Section 7 of the Fair Labor Standards Act; (2) employers whose employees are exempted in Section 7 of the Fair Labor Standards Act, as amended through February 1, 1967, from the provisions of Section 7 of the Fair Labor Standards Act, if the employees are not entitled under such exemptions in Section 7 to 1½ times their regular rate of pay until they have worked more than 48 hours in one week; and (3) employers whose employees are engaged in the laundering, cleaning, or repairing of clothing, or in the clothing manufacturing industries.

provide its male employees with the same benefits required under state law for its female employees.

The district court rejected these arguments,[3] and refused to follow an Eighth Circuit decision extending the benefits of the Arkansas women's premium overtime pay statute to all employees in the state on the same grounds as those advanced by appellants.[4] In so holding, the district court also ruled that the EEOC's power to issue procedural regulations does not include authority to issue regulations which would modify state substantive law to the degree urged by appellants.[5]

Similarly, the district court found that it would be beyond its own power to interpret the challenged statutes in a way which would significantly expand the statutorily designated class of beneficiaries. Although such an interpretation might provide the consistency between the challenged statutes and federal law necessary for upholding the former it would usurp the legislative power vested exclusively in the state.[6]

Such judicial restraint appears particularly warranted in light of the legislative intent which both parties concede to underlie those portions of the state labor code of which the challenged provisions are a part. This court has previously relied on this intent (to afford special protection for women employees) in

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[3]The district court's opinion is reported at 356 F. Supp. 1111 (N.D. Calif. 1973).

[4]*See Hays v. Potlatch Forests, Inc.*, 465 F.2d 1081 (8th Cir. 1972).

[5]356 F. Supp. at 1113.

[6]356 F. Supp. at 1112.

invalidating other "protective" legislation in the California Labor Code as unlawfully discriminatory.[7]

We are persuaded by Judge Renfrew's historical observation that the premium overtime pay provisions of sections 1350 and 1350.5 were part and parcel of the entire body of state law seeking to provide special protection for women workers. We are also persuaded by his conclusion that it is not within the province of the federal courts to attempt to determine how far, if at all, subsequent state legislation has shown an intent to redirect the original focus of the premium pay provisions, unless that intention is clearly shown.[8] This is particularly true when the reading requested by appellants (to extend the premium overtime pay provisions to male workers) would impose a sizeable economic burden on employers affected by sections 1350 and 1350.5.[9]

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[7]See Rosenfeld v. Southern Pacific Co., 444 F.2d 1219 (9th Cir. 1971) (weightlifting and hours limitations on female employees); *Mengelkoch v. Industrial Welfare Comm'n*, 442 F.2d 1119 (9th Cir. 1971) (hours limitations). *See also Burns v. Rohr Corp.*, 346 F. Supp. 994 (S.D. Calif. 1972) (rest breaks only required for women); *Local 246, Utility Workers v. Southern California Edison Co.*, 320 F. Supp. 1262 (C.D. Calif. 1970) (weightlifting restrictions); *Sail'er Inn v. Kirby*, 5 Cal.3d 1, 95 Cal.Rptr. 329, 485 P.2d 529 (1971) (laws forbidding women bartenders).

[8]At least one state supreme court has recently adopted this view. In *Idaho Trailer Coach Ass'n v. Brown*, 95 Idaho 910, 523 P.2d 42 (S.Ct. Idaho, 1974), the Idaho Supreme Court found that subsequent state anti-discrimination legislation had repealed that state's premium overtime pay for women law by implication. Therefore, the Idaho court did not need to consider the trial court's alternative holding that the challenged statute was also unenforceable because it was in conflict with Title VII.

[9]Moreover, it would be particularly speculative for a court to extend the benefits of the statute only to the male employees of these employers covered by the challenged provisions. To do so would seem to assume that the legislature would want the same group of

Finally, we note that the California legislature has recently enacted legislation which will cure the defects of the earlier enactments by expressly allowing the Industrial Commission to prescribe overtime premium pay rates applicable to male and female employees alike. Act of Oct. 1, 1973, Assembly Bill No. 478. Enactment of this legislation, after a similar bill had been vetoed the previous year, would seem to indicate the legislature's realization that the prior version of the overtime pay provisions inaccurately expressed, or was inadequate to express, its current policy.

We agree with the opinion of the district court, and affirm its holding that the statutes and orders in question conflict with the Civil Rights Act of 1964 and therefore cannot be enforced against plaintiff-appellee Homemakers.

Affirmed.

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industries subject to premium overtime pay requirements for all employees as had originally been selected as the foci of the maximum hours limitations for women set out in section 1350.

Appendix B

United States District Court
N.D. California

No. C-72-1864.

Homemakers, Inc., of Los Angeles,
Plaintiff,

vs.

Division of Industrial Welfare and Industrial Welfare Commission of the State of California,
Defendants.

April 2, 1973.

OPINION, ORDER AND JUDGMENT

RENFREW, District Judge.

Plaintiff, an employer of domestic workers and persons who care for the sick in patients' homes, brought this action to declare invalid certain portions of the California Labor Code and related orders of the California Industrial Welfare Commission. A preliminary injunction was sought to restrain defendants, state agencies for industrial welfare, from enforcement of the state laws in question. In addition, plaintiff has filed a motion for summary judgment.

Both motions present the same issue: Whether § 1350 and § 1350.5 of the California Labor Code and

Order 5-68 § 3 of the California Industrial Welfare Commission regulating employment and compensation of women are in conflict with Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.) and, if so, whether the state statutes and regulations should be declared invalid as being preempted by the federal statutes.

Section 703(a)(1) of the Civil Rights Act of 1964 states that it is an unlawful employment practice to discriminate on the basis of sex "against any individual with respect to his compensation, terms, conditions or privileges of employment." 42 U.S.C. § 2000e-2(a)(1). Under the California statutes challenged here, plaintiff is required to pay overtime premium only to female employees. Plaintiff has refused to pay the premium on the basis that such compliance with state law would be a violation of the federal statutes which have invalidated all women's protective laws. See Sail'er Inn v. Kirby, 5 Cal.3d 1, 9-10, 95 Cal.Rptr. 329, 485 P.2d 529 (1971); Rosenfeld v. Southern Pacific Company, 293 F.Supp. 1219, 1224 (C.D.Cal.1968), affirmed 444 F.2d 1219 (9 Cir. 1971); Mengelkoch v. Industrial Welfare Commission, 284 F.Supp. 956, 959 (C.D.Cal.1968).

The Court agrees with defendants that the Civil Rights Act of 1964 invalidates only those state statutes which are inconsistent with Title VII provisions. See 42 U.S.C. § 2000e-7 and § 2000h-4. However, the Court does not agree that the necessary consistency can be found in the state statutes by interpreting them as requiring the employer, if he chooses to have

any employees work overtime, to pay the same overtime premium to men as well as to women. Such an interpretation would constitute usurpation of the legislative power that has been vested exclusively in the state Legislature. The Court is aware that the only authority directly on this issue is contrary. The Court has read carefully the opinion of Chief Judge Henley in Potlatch Forests v. Hays, 318 F.Supp. 1368 (E.D. Ark.1970), dealing with provisions in the Arkansas Labor Code substantially identical to those involved here. There the court extended the overtime benefits to male employees. See also the affirming opinion of the Court of Appeals for the Eighth Circuit in Hays v. Potlach Forests, Inc., 465 F.2d 1081 (8 Cir. 1972). However, this Court concludes that a federal court may not exercise the legislative power vested solely in the state legislature in order to avoid a conflict between state and federal law.

Defendants urge that extension of the benefits to male employees may be granted pursuant to "Equal Pay" laws which set no wages but require that there be no sex-based distinction in compensation (Cal. Labor Code, § 1197.5; 29 U.S.C. § 206(d), which requirement, say defendants, makes it mandatory that employers pay both sexes at whatever pay rate is higher. Such an extension of benefits to men would conflict with the legislative intent of the statutes in question. This intent, as both defendants and the Equal Employment Opportunity Commission (EEOC), as amicus curiae, have conceded in their memoranda, was to protect only working women, not

men, by supplementing women's income in an attempt to narrow the gap between the income of working women and that of men similarly employed.

To extend the benefits of the statutes to an entirely new class of beneficiaries would thus be a substantial change in legislative intent. Defendants urge the Court to make this change, however, referring to EEOC guidelines which say an employer will be adjudged in violation of Title VII if it refuses to hire female employees to avoid payment of overtime or if it fails to provide the same benefits for its male employees. 29 C.F.R. § 1604.2(b)(3) (37 Fed.Reg. 6836, April 5, 1972).

The Court agrees that great deference should be given EEOC guidelines and interpretative comments, because the EEOC is charged with the responsibility of enforcing the Civil Rights Act of 1964. Griggs v. Duke Power Co., 401 U.S. 424, 433-434, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971); see also United States v. City of Chicago, 400 U.S. 8, 10, 91 S.Ct. 18, 27 L.Ed.2d 9 (1970). But the authorization given the EEOC by Congress is to issue procedural regulations. Such authority does not include regulations which would effect substantive state law to the degree urged here, namely that of adding a new class of beneficiaries to those already covered by the California statutes requiring overtime payments to women. Such a substantial change in legislative intent should be made by the legislature, not the courts. Burns v. Rohr Corp., 346 F.Supp. 994, 997 (S.D.Cal.1972); Bastardo v. Warren, 4 E.P.D. § 7635 (W.D.Wis. 1970).

While this Court may question the motives of plaintiff and sympathize with its women employees, nevertheless it refuses to exercise the legislative power which belongs solely to the California Legislature. This is particularly so where, as here, a bill which would have expressly extended to all employees the Labor Code statutes regulating working conditions of women and minors was passed by the California State Legislature in its 1972 regular session (A.B. 1710) but was vetoed by the Governor at the close of that session.

There is no question of fact remaining which would preclude an opinion on plaintiff's motion for summary judgment. The statutes and orders in question are in conflict with the Civil Rights Act of 1964 and are therefore invalid. Accordingly,

It is hereby ordered, adjudged and decreed that § 1350 and § 1350.5 of the California Labor Code and Order 5-68 § 3 of the California Industrial Welfare Commission are in conflict with and superseded by Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.).

It is hereby further ordered, adjudged and decreed that plaintiff's failure to comply with § 1350 and § 1350.5 of the California Labor Code does not give rise to an unlawful employment practice under Title VII of the Civil Rights Act of 1964.

It is hereby further ordered, adjudged and decreed that plaintiff's motion for summary judgment is granted and that each party shall bear its respective costs herein.

Appendix C

CALIFORNIA LABOR CODE

§ 1350.5

(a) Employers of employees covered under the provisions of the Fair Labor Standards Act may employ females up to 10 hours during any one day of 24 hours or up to 58 hours in one week, provided that they are compensated at the rate of 1½ times the regular rate of pay for time worked for one employer in excess of eight hours any one day or 40 hours in any one week.

(b) The provisions of subdivision (a) shall not apply to: (1) employers whose employees are exempted in Section 13 of the Fair Labor Standards Act as amended through February 1, 1967, from the provisions of Section 7 of the Fair Labor Standards Act; (2) employers whose employees are exempted in Section 7 of the Fair Labor Standards Act, as amended through February 1, 1967, from the provisions of Section 7 of the Fair Labor Standards Act, if the employees are not entitled under such exemptions in Section 7 to 1½ times their regular rate of pay until they have worked more than 48 hours in one week; and (3) employers whose employees are engaged in the laundering, cleaning, or repairing of clothing, or in the clothing manufacturing industries.

(c) The provisions of subdivisions (a) and (b) of this section shall not affect or change the provisions of any existing collective bargaining agreement.

(d) Notwithstanding the provisions of subdivision (b) of this section, the provisions of subdivision (a) of this section shall apply to the employment of females by railroads or airlines certificated by the federal or state government, except that subdivision (a) shall not apply where any such employee of such airline, except a commissary employee (1) works over 40 hours in any one week, but not more than 60 hours, where the time worked in excess of such 40 hours is due to a temporary modification in the employee's normal work schedule, not required by the employer but arranged for the convenience of the employee, including but not limited to, situations where the employee requests a change in days off or trades days off with another employee; or (2) works a four-day week of not more than 40 hours.

Appendix D

CALIFORNIA LABOR CODE

§ 1197.5 Equal wage rates for all employees; variations; enforcement

(a) No employer shall pay any individual in his employ at wage rates less than the rates paid to employees of the opposite sex in the same establishment for the same quantity and quality of the same classification of work; provided, that nothing herein shall prohibit a variation of rates of pay for male and female employees engaged in the same classification of work based upon a difference in seniority, length of service, ability, skill, difference in duties or services performed, whether regularly or occasionally, difference in the shift or time of day worked, hours of work, or restrictions or prohibitions on lifting or moving objects in excess of specified weight, or other reasonable differentiation, factor or factors other than sex, when exercised in good faith.

(b) Any employer who violates subdivision (a) of this section is liable to the employee affected in the amount of the wages of which such employee is deprived by reason of such violation.

(c) The provisions of this section shall be administered and enforced by the Division of Industrial Welfare. After receipt of a complaint alleging a violation of this chapter, made by an employee, authorized representatives of the division shall have authority to inspect payrolls and other employment records, to compare character of work and operations in which

employees are engaged, to question such persons and to obtain such other information as is reasonably necessary in the enforcement of this section. If the division finds that an employer has violated Section 1197.5, it may supervise the payment of any sums found to be due and unpaid to employees under subdivision (a) of this section. Acceptance of payment of sum or sums made by an employer and approved by the division shall constitute a waiver on the part of the employee of his cause of action under subdivision (g) of this section.

(d) Every employer of male and female employees shall maintain records of the wages and wage rates, job classifications and other terms and conditions of employment of the persons employed by him. All such records shall be kept on file for a period of two years.

(e) Any affected employee may register with the Division of Industrial Welfare a complaint that the wages paid to him are less than the wages to which he is entitled under subdivision (a) of this section. The division shall take all proceedings necessary to enforce the payment of any sums found to be due and unpaid to such employees.

(f) The department or division may, with the consent of the employee or employees affected, commence and prosecute a civil action to recover unpaid wages under subdivision (a) of this section, and in addition to such wages shall be entitled to recover costs of suit. The consent of any employee to the bringing of any such action shall constitute a waiver on the part of the employee of his cause of action under subdivision (g)

unless such action is dismissed without prejudice by the department or the division.

(g) Any employee receiving less than the wage to which he is entitled under this section may recover in a civil action the balance of such wages, together with the costs of suit, notwithstanding any agreement to work for a lesser wage.

(h) The burden of proof in any civil action shall be upon the person bringing the claim to establish that the differentiation in rate of pay is based upon the factor of sex and not upon other differences, factor or factors.

(i) A civil action to recover wages under subdivision (a) of this section may be commenced no later than two years after the cause of action occurs, if the employee does not have knowledge of such violation, and not later than 180 days after the cause of action occurs if the employee has knowledge of such violation.

Appendix E

CIVIL RIGHTS ACT OF 1964

The pertinent provision of Title VII is 42 U.S.C. § 2000e-2, which reads in relevant part:

> "(a) It shall be unlawful employment practice for an employer—
>
> "(1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> "(2) to limit, segregate, or classify his employees in any way which deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.
>
> * * * * * *
>
> "(e) Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise. . . ."